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IN THE

Supreme Court of the United States

OCTOBER TERM, 1947

No. 616

FRANK M. SWACKER,

Petitioner,

v.

THE PENNROAD CORPORATION and DANIEL O. HASTINGS
(Respondent therein to the Petition of Frank M. Swacker),

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE AND BRIEF IN SUPPORT THEREOF

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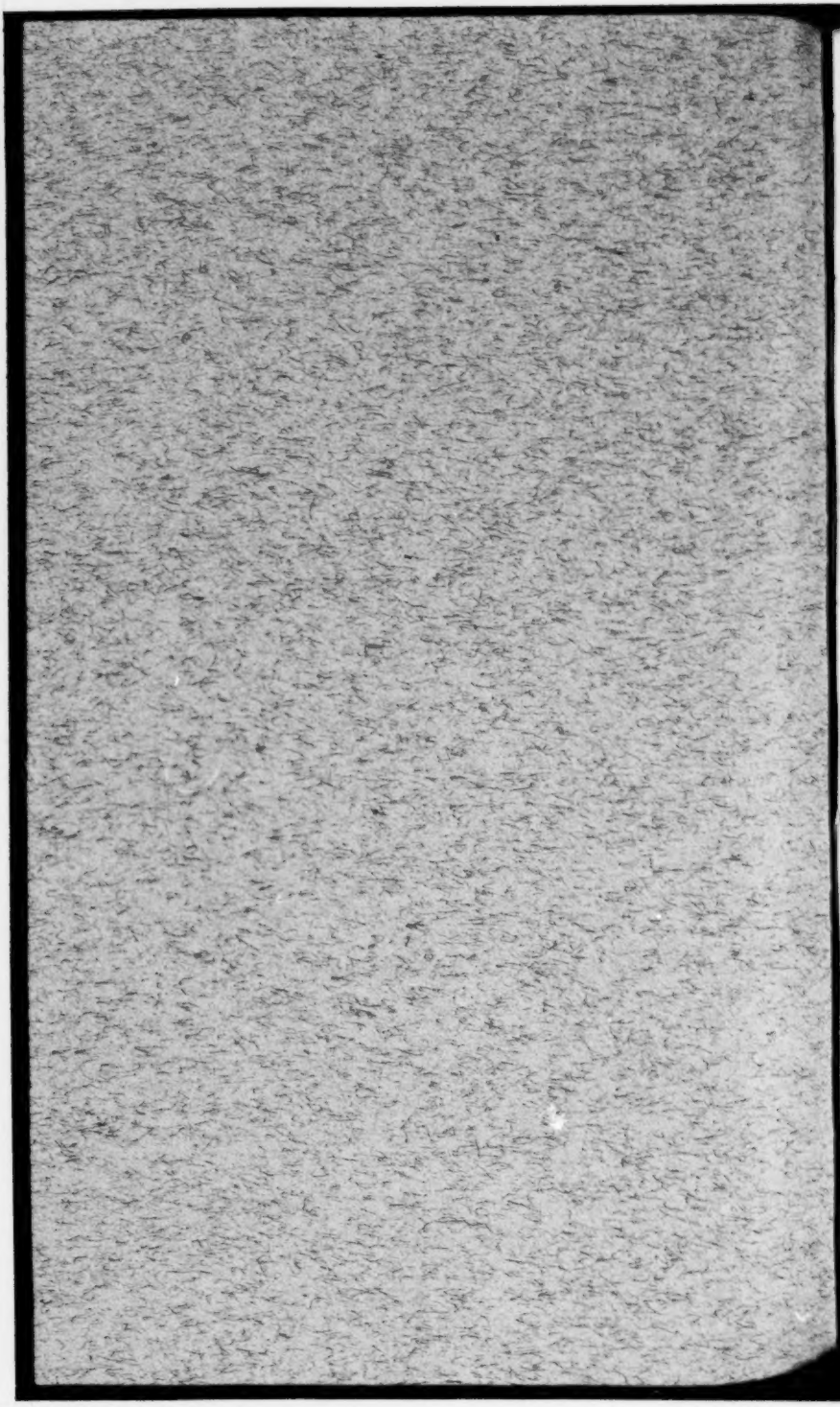

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PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

Frank M. Swacker, petitioner, prays that a writ of certiorari issue to review the judgment entered the 19th day of December, 1947, by the Supreme Court of the State of Delaware, the highest court of the State, in the case of *Frank M. Swacker v. The Pennroad Corporation,* a corporation of the State of Delaware, and *Daniel O. Hastings* (Respondent therein to the Petition of Frank M. Swacker).

OPINION BELOW

The opinion of the Supreme Court of the State of Delaware is not yet reported, but is set out at (R. 990).

JURISDICTION

The judgment of the Supreme Court of the State of Delaware was entered December 19, 1947 (R. 1002). The jurisdiction of this Court is invoked under the provisions of Section 237 (b) of the Judicial Code, as amended.

QUESTION PRESENTED

Whether the refusal by the highest court of the State of Delaware to recognize the fundamental doctrine that there is inherent in a joint venture by attorneys a fiduciary relationship that precludes one of them from dealing for his own account to the exclusion of his associate with the subject matter of the joint venture, and a consequent failure by said court to make effective the high standards of fiduciary conduct attendant thereupon, is a deprivation of property without due process of law, contrary to the Fourteenth Amendment to the Constitution of the United States.[1]

Briefly stated, petitioner and respondent Hastings undertook a joint venture as co-counsel under an agreement for an equal division of the fee. The lower court refused to follow the rule of law applicable to such a venture, but instead applied the rules of contract law applicable between strangers and then arbitrarily supplied, wholly without evidence, a condition to the conceded contract, further holding that petitioner had failed to comply with such condition, directly contrary to the evidence, and upon this finding reached the legal conclusion that there was a "failure of consideration." The facts are set forth in detail in the Statement herein immediately following the Specification of errors to be urged.

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[1] The Pennroad Corporation is now merely a stakeholder and the controversy here presented is between petitioner and two other attorneys, members of the Bar of this Court, who were brought into the litigation by petitioner and are now enabled—unless this Court intervenes—to overreach petitioner as a consequence of the refusal of the Delaware Supreme Court to apply the principles of fidelity arising from a joint venture of co-counsel.

The result is so arbitrary as to constitute a denial of due process of law under the Fourteenth Amendment of the Constitution of the United States.

The question was raised at the outset in the court of first instance, the Chancery Court for Newcastle County, Delaware, by petitioner's petition (Paragraph 5, R. 5) asserting and claiming under the rules of law applicable to joint ventures; it was passed upon by that court (Paragraph 2 of the final decree, R. 414) which refused to apply such rules and further found a condition of the contract unsupported by evidence and arbitrarily supplied the findings complained of. (R. 409) This action by the Vice Chancellor was specifically assigned as error on the appeal to the Supreme Court of Delaware, being Assignments of Error 6 and 7, as follows:

> "6. The Chancellor erred in material findings of fact which are not supported by, or which are contrary to the evidence; and failed to find material facts upon the admitted or uncontroverted evidence, which makes his findings and his failure to make findings so arbitrary as to be repugnant to the due process clauses of the Constitution of the State of Delaware and of the United States.
>
> 7. The Chancellor erred; in that his findings and conclusions of law, in denying application of fundamental principles of law of Fiduciaries inherent in joint venture undertakings to the undisputed facts which establish such an undertaking here, are arbitrary, and so constitute a denial of due process." (R. 418)

The Supreme Court of Delaware sustained the Vice Chancellor's decision, finding, however, a different condition of the contract, but reaching the same result as that reached by the Vice Chancellor (R. 996-998)

The question involved is substantial because uncorrected the decision of the Supreme Court of Delaware creates a rule of substantive law repugnant to the common law,

counter to the decisions of this Court and to the decisions of the highest court of every state which has dealt with the subject matter; and in so doing establishes a rule of law that will be binding on the Federal Court for the District of Delaware.

An additional independent, and it is thought alone adequate reason for this Court to take jurisdiction of this controversy lies in the fact that the persons involved are all members of the Bar of this Court, and the conduct of the respondent Hastings is challenged upon grounds that might well invoke the corrective powers of this Court to insure fair dealings between one another by members of its Bar.

SPECIFICATION OF ERRORS TO BE URGED

The Supreme Court of the State of Delaware erred:

1. In failing to give effect to the contractual relation between petitioner and co-counsel with respect to their fees;
2. In failing to give recognition and effect to the fiduciary relations between petitioner and co-counsel;
3. In denying petitioner his right to an equal division of fees between himself and co-counsel, in disregard of the contractual-fiduciary relations between them;
4. In failing to fix the amount of fees of counsel for complainants and refusing to award petitioner one-half thereof as a joint venturer;
5. In arbitrarily finding (a) that a condition of the contract between petitioner and respondent Hastings, was that petitioner should perform one-half of the work, which finding is wholly without evidence to support it, and (b) in finding that petitioner failed to perform the work required of him under the agree-

ment, which finding is directly contrary to the undisputed evidence in the case.

6. In holding that there was, on the part of petitioner, failure of consideration under the agreement regarding fees between himself and co-counsel.

STATEMENT

Petitioner, an attorney with his offices in the City of New York, and a member of the bar of this Court, initiated on a contingent basis a suit on behalf of the stockholders of The Pennroad Corporation, a corporation of the State of Delaware, against the Pennsylvania Railroad Company, a corporation of the Commonwealth of Pennsylvania, and its Directors.[2] This suit, after service in a like proceeding had been quashed in New York, was filed in the Court of Chancery of the State of Delaware October 18, 1932 (R. 397). The suit is entitled *Perrine et al v. The Pennroad Corporation, etc., et al.* It eventuated in a judgment for the complainants in the sum of $15,000,000. This judgment, entered as a result of a settlement, was approved by the Supreme Court of the State of Delaware, May 27, 1946 (47 A. 2d 479; cert. den., No. 595, October Term, 1946). The Court of Chancery of Delaware had approved the settlement agreement August 13, 1945, at which time it included in its decree the following provision:

> "The Chancellor reserves jurisdiction to determine and award compensation, fees, allowances and expenses to any interested parties who do not otherwise agree with the Pennroad Corporation with respect thereto. Any such interested party who has not heretofore done so, may file, within ten days from the entry of this decree, a petition for such compensation, fees, allowances and expenses". (R. 6)

[2] The Vice-Chancellor of Delaware described petitioner as an attorney "whose skill, qualifications and experience in the type of litigation involved in this case entitle this Court to conclude, and I do conclude, that he is one of the outstanding attorneys in this field." (R. 396; see, also, 46-56; 349).

The present proceeding arose on a petition which petitioner had filed within the framework of the *Perrine* case, (R. 1, 3) praying that if and when the settlement was approved by the Court of Chancery and payment made to The Pennroad Corporation the Court retain control over the fund and make an allowance to petitioner and Daniel O. Hastings as counsel for the Complainants, as well as allowances to any others entitled thereto, and to award to petitioner one-half of the fee to be allowed petitioner and Daniel O. Hastings as counsel for complainants. (R. 1-4). The proceedings had on this petition and Hastings' answer (R. 5) eventuated in the decision of the Supreme Court of the State, *supra,* which affirmed a decree of the Court of Chancery refusing an allowance jointly to petitioner and Hastings and an award of one-half thereof to petitioner, and awarding petitioner on a *quantum meruit* basis the sum of $300,000, giving no effect to the fiduciary-contractual relations of counsel.

The fees of Hastings and others, as more fully explained hereinafter, were the subject of an arbitration agreed to by them and Pennroad but not by petitioner, and aggregated $1,900,000, with an additional $545,000 award to other counsel and certain persons not counsel. (Supplemental Record, 14.) The arbitrator was Hon. George A. Welsh, Judge of the United States District Court for the Eastern District of Pennsylvania, acting not in a judicial capacity but as the arbitrator agreed upon by other attorneys and Pennroad.

The course of events which preceded the outcome above summarily stated are as follows:

Petitioner selected Delaware as the forum for the *Perrine* litigation. In 1932 he employed local counsel there, (R. 65). Petitioner drafted the complaint and appears on it, having been admitted in Delaware *pro hac vice.*

Employed in petitioner's office on a salary basis was

Hugh F. O'Donnell, who worked on the case. O'Donnell began to practice on his own in 1935. He continued in the case under an agreement with petitioner for contingent compensation, from petitioner's share, of $100 per day but not to exceed ten per cent of the whole fee allowed complainants' counsel (R. 348-9, 397).

When the original Delaware counsel withdrew in 1936 because of a conflict of interest (R. 396, 398) a great deal of work had been done (R. 449-867) of which petitioner with the assistance of O'Donnell had done the major part. The Chancery Court concluded that the service of original Delaware counsel should be credited to petitioner (R. 396, 398). Details of the large and important quantity of work done by petitioner are enumerated in various parts of the record (R. 471, 535; 568, 570, 655; 850-2, 860, 56-96).

Upon withdrawal of the original Delaware counsel petitioner negotiated with Senator Hastings' firm, of Delaware (R. 398). Senator Hastings thus came into the case about June 1, 1936, some four years after its initiation. The first arrangement between petitioner and Hastings was that petitioner and O'Donnell "should continue to carry the burden of the case and rely upon this firm (Hastings') for court appearances, formal matters and future hearings" on a contingent basis with one-third interest to Hastings. (R. 398)

This arrangement continued until January, 1937.

Meanwhile, the work by petitioner of preparing the case went on. Evidence was being assembled. Information was being supplied to the Wheeler Committee of the United States Senate, which was making a complete investigation of railroad activities, and produced the bulk of the evidence on which the issues were later tried in the federal court in Philadelphia (R. 212, 943-944, 303, 306).

Vice Chancellor Seitz found specifically (R. 402):

> "• • • From June 1, 1936, to the latter part of January, 1937, when the written agreement was in effect, Swacker pulled the laboring oar. • • •"

The written contract regarding the participation of Hastings was subsequently modified. On December 21, 1936, the Hastings firm wrote petitioner (R. 884), in part as follows:

> "I am very pleased to inform you that Senator Hastings has concluded to take an active part in this litigation. If agreeable to you, we will plan a conference shortly after the holidays. • • •"

In the Vice-Chancellor's language (R. 399):

> Following this letter, Swacker and O'Donnell came to Wilmington toward the last of January, 1937 and had a long conference with Hastings, at which time they discussed the entire matter. At that time, Swacker and Hastings orally agreed that the estate of J. Markham Marshall (he died in the summer of 1936) was entitled to receive from five to ten per cent of the aggregate fee, and that the balance would be divided equally between Hastings and Swacker."

The Vice-Chancellor added (R. 399):

> "Hastings contends that they agreed to share the work equally. Swacker says that the agreement contemplated that each would do 'what might most naturally fall to us to do.' "

The record clearly establishes that the division of work between petitioner and Hastings was not even discussed. Note, e. g., that in referring to events *four years* after the modification, Hastings testified, "*by that time* it is not surprising that *I had supposed* my fifty-fifty contract was out of the window". (R. 298) (Emphasis supplied).

Both petitioner and Hastings did a substantial amount of work from January, 1937, to March, 1938, when Perrine and one Guiterman, a lay representative of Perrine,

(without justifiable cause), brought about petitioner's discharge.[3] (R. 932)

But no different arrangement for fees was made between petitioner and Hastings and O'Donnell growing out of this situation.

Petitioner told both Hastings and O'Donnell that it was satisfactory to him to have them go on with the case, subject to their consulting him on steps materially affecting the policy of the litigation (R. 228-9, 294, 367), a qualification they deny.

O'Donnell kept petitioner apprised of all steps taken and constantly consulted with him. He used petitioner's assembled evidence, even in the trial of the Philadelphia cases hereinafter referred to. (R. 236, 367, 371-373). *There was no new fee arrangement* (R. 249-250, 328-9, 360, 936-937). Although Guiterman desired Hastings and O'Donnell to go on with the case there was no separate hiring of them; they simply continued (Rec. 112, 228-9 360).

The Court of Chancery correctly found (R. 405) that at the time of petitioner's "discharge" O'Donnell was working with petitioner on the *Perrine* case under a separate contingent agreement with petitioner. The same is true as to petitioner and Hastings.

In the spring of 1938 Guiterman and O'Donnell saw Robert E. Lee Marshall, of Baltimore (R. 307-308) *without petitioner's knowledge;* later Hastings came into conversations between O'Donnell and Marshall, who was invited into the case (R. 12) and it was decided to bring a suit in the United States District Court for the Eastern District of Pennsylvania involving one of the situations covered by the pending *Perrine* case (R. 296, 310, 326, 361-2). This

[3] Petitioner previously had refused to arrange for participation by Guiterman, in petitioner's fee, believing this to be unethical and unlawful (R. 931).

became the *Overfield* case filed in Philadelphia March 30, 1939. *Petitioner first learned of this suit in May, 1940* (R. 149).

On March 28, 1939,—two days before the *Overfield* suit was brought in Philadelphia — Hastings, Marshall and O'Donnell met in Hastings' office (R. 296, 362), *without petitioner's knowledge* (R. 190, 297), and agreed to divide the compensation derived from the *Perrine* case or any suit that might be brought in Philadelphia at the instance of the Hastings firm, the Marshall firm in Baltimore, or O'Donnell. Hastings describes the purpose of the meeting thus:

> "• • • we undertook to make some provision for Marshall's participation in this litigation". (R. 296).

O'Donnell stated that he was not in a position to ask for more than ten per cent, obviously because of his contract with petitioner. The agreed division was: The Hastings firm, 42 per cent; the Marshall firm, 25 per cent; and O'Donnell, 10 per cent.

The agreement (R. 913) reciting that he "may be entitled to as much as 18 per cent", set that percentage aside for petitioner. It also contained the following:

> "It is also contemplated, that in any suit brought in the State of Pennsylvania, it may be necessary to have additional counsel, and provision must be made for their compensation. It is not contemplated that Swacker will have any part in the division of any fees growing out of the suit in Pennsylvania".

After being prepared in the Hastings office, the agreement was signed by Hastings and forwarded to Marshall in Baltimore. Some time later, at a date which O'Donnell was unable to fix, he was in Marshall's office and inquired what became of the agreement. Marshall stated he had forgotten all about it; that he had put it in a desk drawer (R. 363). He subsequently forwarded it to O'Donnell.

According to O'Donnell, that is when he first saw the agreement. Later, *in 1941,* he told petitioner about it, and stated that, *because of the last sentence in the quoted paragraph, he had refused to sign it.* (R. 364).

When O'Donnell subsequently called Hastings' attention to the sentence to which he objected, Hastings concurred that the agreement was unfair to petitioner and told him he was ashamed it had been drawn in his office, because he appreciated petitioner "had done some work and that he ought to be taken care of" (R. 297). O'Donnell's testimony (R. 364) and that of Hastings (R. 297) is quite enlightening.

Hastings, in May, 1940, called petitioner on the telephone in Chicago because he in his turn was now having trouble with Guiterman; Hastings was fearful he was being squeezed out by the *Overfield* case and he desired to file still another suit in the federal court in Philadelphia covering everything in the *Perrine* case and including the subject matter of the *Overfield* case (R. 149-151). Hastings asked petitioner to supply a stockholder for that purpose. Guiterman sought to replace Hastings, (R. 295-6) who feared he might be "kicked out" of both the *Perrine* and *Overfield* cases. Hastings testified that he now felt he needed a client of his own (R. 297-8). On June 7, 1940, he filed the *Weigle* case in Philadelphia. Hastings testified as above pointed out, as of the situation at that time (May, 1940, R. 297) more than 2 years after petitioner's "discharge" by Guiterman and four years after his contract with petitioner which had never been revised:

> "Now, *by that time* it is not surprising that I *had supposed* my fifty-fifty contract was out of the window". (R. 298) (Emphasis supplied).

There followed certain self-serving efforts of Hastings, Marshall and O'Donnell, without the knowledge of petitioner, to arrange for division of fees (R. 365-366) see, also, 259-260). In the meantime, petitioner was pushing

O'Donnell to get the *Perrine* case to trial in Delaware (R. 157). O'Donnell does not dispute petitioner's testimony that O'Donnell "continued the preparation in my office—I oversaw it—day after day, using mainly these Senate reports as the basis of preparation for trial, for trial briefs." (R. 157). Petitioner, in fact, even before the advent of Hastings into the case, had been making suggestions to the Pecora and Wheeler Committees which resulted in developing the evidence necessary to prove the case. (R. 943-4).

The *Perrine* case was set down for trial in Wilmington on February 10, 1941 (R. 157). Thereafter Judge Welsh ordered the *Overfield* and *Weigle* cases tried on the same date. (R. 158) When O'Donnell advised petitioner these cases were to be tried in February this was the first petitioner had heard of the *Weigle* case. O'Donnell said Hastings had filed it "to checkmate Guiterman's machinations in connection with the *Overfield* proceedings". (R. 157-8). When petitioner then learned also for the first time that Hastings, Marshall and O'Donnell had made a fee arrangement without provision for his participation he thought there should be an understanding. He was willing to modify his agreement with Hastings so as to take less than fifty per cent (R. 165-6). Earnest efforts of petitioner to reach a new accord in the matter met with evasion. (R. 166, 369, 370, 328, 329, 929, 933-7, 191, 192; see, also, 370).

In the *Overfield* and *Weigle* cases the pre-trial preparation was that made for the *Perrine* case (R. 193-195). Those cases went to trial in the District Court of the United States for the Eastern District of Pennsylvania, before Judge Welsh. The trial lasted 78 days. (R. 137). Hastings, Marshall and O'Donnell presented various phases of the case. Petitioner's assistance was of great value. (R. 379-381). *Throughout the trial O'Donnell spent Saturdays in petitioner's office consulting with him, assembling data, preparing, etc.* (R. 161).

A judgment was obtained for some $22,000,000. The judgment was reversed by the United States Circuit Court of Appeals for the Third Circuit, 146 F. (2d) 889 (1944), on the ground that the statute of limitations had barred the suit. If correct, this killed the *Overfield* and *Weigle* cases, but because of the evidence assembled, primarily by petitioner, which had been presented in those cases, and the pendency of the *Perrine* case, settlement negotiations were begun and a settlement of $15,000,000 was agreed upon. Of this amount not to exceed $3,000,000 was provided for counsel fees (R. 134-8; Supplemental Record, 4-5, 11).

But Counsel for the companies naturally said it was *the Perrine* case that was to be settled and *not the Philadelphia cases which had been won by the defendants.* (R. 135, see, also, pp. 144-5).

Hastings agreed but insisted that the fees be fixed by Judge Welsh as arbitrator (R. 136), because, "Mr. [Lee] Marshall, for instance, had never had anything to do with the Perrine suit excepting to consult with us from time to time while we were preparing it, but he had not entered any appearance." (R. 135).

And, "I", Hastings, "then said to Mr. McCracken and Mr. Wolf and Mr. Dickinson, 'I can't agree unless we have Judge Welsh determine the fees, because that is where the work was done and he knows what was done, and there are other people that would have no standing in the Perrine suit at all. Welsh must determine those fees if this agreement is to be put through.' " (R. 136).

And, "Then Mr. Wolf and I got in a cab and went down to see Judge Welsh to see whether or not he would act as arbitrator, and he readily agreed to act as arbitrator." (R. 136).

Thus, though the settlement was of the suit petitioner had initiated, the only suit really left alive to settle, Hast-

ings obtained an arrangement for the fixing of fees by the judge who presided over the ill-fated suits in the Federal Court in Philadelphia. (R. 136).

Application was made to the Delaware Court of Chancery for approval of the settlement. *Petitioner appeared in support of the application* (R. 196) *and the settlement was approved.*

Another attorney now entered his appearance for the surviving complainant, thus displacing Hastings. (See No. 595, Oct. Term, 1946).

Judge Welsh, however, over in Philadelphia, undertook to serve as arbitrator to fix allowances of fees, compensation and expenses. Petitioner declined to enter this arbitration. He felt that such matters were peculiarly within the province of the Delaware Court of Chancery and, accordingly, when the $15,000,000.00 settlement came before that Court for approval he asked the Court to retain jurisdiction to fix the compensation of counsel. The Chancellor complied to the extent of embodying in his decree the provision hereinabove referred to reserving jurisdiction to determine and award compensation, fees, allowances, and expenses "to any interested parties who do not otherwise agree with the Pennroad corporation with respect thereto".

After a hearing before the Vice Chancellor on petitioner's petition, Hastings testified before Judge Welsh, who on May 5, 1947, made his award (Supplemental Rec. 3). He allowed Hastings and his associates, including O'Donnell, $1,900,000[4] (Supplemental Rec. 14), and he made allowances of $115,000 to Guiterman, who is not a member of the bar, $80,000 to the committee of which Guiterman was chairman, and $350,000 to counsel for various inter-

[4] Under their agreement this amount is to be divided as follows:

Strubing (counsel of record)	190,000
Hastings	666,900
Marshall	521,550
O'Donnell	521,550

venors of minor participation in the *unsuccessful Philadelphia cases.*

The Courts of Delaware allowed petitioner $300,000 on a *quantum meruit* basis, giving no regard whatever to the joint adventure character of the relations between petitioner and Hastings and O'Donnell. The Court found the contract between petitioner and Hastings but rested its decision upon its further finding, wholly unsupported by evidence, that there was a "failure of consideration" on petitioner's part.

The findings of fact by both the Vice Chancellor and the Supreme Court of Delaware are so unsupported by evidence and contrary thereto as to render them arbitrary. It was not claimed in the testimony of either of the parties that anything was said at the time of the making of the contract as to any division of the work to be performed. The only evidence whatsoever bearing on this matter is that contained in petitioner's letter of May 29, 1936 (R. 868) originally employing Hastings, where at the end thereof petitioner offered alternative suggestions, one of which was "or, you to take active charge of the litigation, we according you such assistance as we can". Petitioner testified that he considered it was reasonably to be expected that each of the Parties "would do what might most naturally fall to us to do". (R. 399) Respondent Hastings testified "There wasn't any specific statement about who would try (to) the case but it was generally understood, I think, among all of us, that a division of the fees meant that we would divide the work practically equally". (R. 289)

The Vice Chancellor refused to accept respondent Hastings' contention that the agreement had as a condition a term that the work should be equally divided; instead he adopted petitioner's inference that each "would do what might most naturally fall to us to do". (R. 401) There

can be no question that both parties were at the time referring only to the Perrine case in Wilmington because that was the only case in existence at the time and the only subject matter under discussion. Yet the Vice Chancellor, following that conclusion, applied the supposed obligation on the part of petitioner to the activities of respondent Hastings in the *Philadelphia* cases, which were not even in existence at the time the obligation was supposed to have been assumed. And on that hypothesis, supplying a further finding (R. 404) that petitioner "was one of the outstanding trial lawyers in the country in this type of litigation", assumed that there was implicit in the supposed obligation participation in the trial of the case; and then stretched this assumption to participation in the trial of the *Philadelphia* cases; and upon the failure of petitioner personally to participate in the trial of those cases which respondent Hastings never asked him to do, reached the conclusion that petitioner had defaulted in his obligation under the contract, thus constituting a material "failure of consideration." (R. 409)[5]

The Supreme Court of Delaware went further than the Vice Chancellor in that it adopted respondent Hastings' contention that there was implicit in the contract an obligation on petitioner's part to do one half the work to be done, (notwithstanding the utter absence of evidence to that effect), and then, as did the Vice Chancellor applied the supposed obligation concerning the Perrine case to extend to the Philadelphia cases not even in existence at the time the contract was entered into, and then completely ignoring petitioner's contribution to the Philadelphia cases, reached the same conclusion as the Vice Chancellor, i. e. that the failure to participate in the trial of the Philadelphia

[5] The Vice Chancellor recognizes that Petitioner did contribute to the trial of the Philadelphia action to the full extent to which he was requested, but instead of attributing that to performance under the contract, found "This cooperation by Swacker is understandable because he hoped to procure an allowance in the Federal court if the Overfield-Weigle suits culminated successfully". (R. 409)

cases constituted such a material breach of the contract as to be a "failure of consideration", thus rendering the contract unenforceable. (R. 996-998)

REASONS FOR GRANTING THE WRIT AND BRIEF IN SUPPORT THEREOF

The most solemn fiduciary relationship existed between Hastings and petitioner, between O'Donnell and petitioner and between Hastings and O'Donnell and petitioner.

Hastings was brought into the Perrine case by petitioner and no arrangement between them other than for an equal division of fees ever existed after the original agreement for one-third to Hastings was modified by increasing his share to fifty percent. This is so notwithstanding petitioner undertook in 1941 to make arrangements more favorable for Hastings, failing to do so because of Hastings' failure, for reasons of his own, to cooperate to that end.

O'Donnell had come into the case as an employee in the office of the petitioner in New York. Using the Perrine case, and the preparation of it by petitioner, as the center of all that followed and as the base of operations, Hastings and O'Donnell, with other counsel interested by them, ventured forth with the two suits in the federal court in Philadelphia. They did this without making any different arrangements with petitioner for fees in connection therewith and indeed without petitioner's knowledge at the time. Much labor was expended by Hastings and O'Donnell in the trial of these suits. This included the previous labor of petitioner and current consultation with him. But in the end these cases furnished no successful outcome of themselves. The judgment obtained in the federal court was reversed; and the strong probabilities are that except for the pendency of the Perrine case filed in 1932 by petitioner, the Pennsylvania Railroad Company could have escaped all liability by reason of the bar of the statute of limitation, which was the basis of the reversal of the judgment.

In order to effect the settlement for $15,000,000 it was necessary to resort to the Perrine case in Delaware which was alive, was not barred by limitations and was in fact the foundation of the fund created by the settlement.

Hastings, O'Donnell, Marshall, and others, nevertheless, obtained by arbitration of the judge who presided over the unsuccessful Federal cases in Philadelphia fees aggregating $1,900,000, and there were additional allowances to the Guiterman group and to intervenors of $545,000. Although the settlement of the litigation was necessarily to be approved by the Delaware Courts, these awards were not brought for approval to those courts, which had control of the funds and jurisdiction to make allowances for fees and expenses. Those who participated in the arbitration agreed with Pennroad for the payment by it of these awards.

It cannot be controverted that the allowances of $2,455.-000 to others than petitioner is based largely upon their participation in the Philadelphia cases and that the selection of Judge Welsh as arbitrator had this purpose in mind. (R. 135-6)

In essence, therefore, and disregarding all irrelevant considerations, the fund of $15,000,000 had its primary and also its ultimate source in the *Perrine suit initiated by petitioner and all subsequent efforts rested upon the preparation which had been made by petitioner in that suit. It was this suit which stood as the source of recovery and the vehicle for its accomplishment,* after all the intervening ramifications of activity. It sprang from petitioner's foresight, research and expertness.

Petitioner brought Hastings and O'Donnell into this suit, the latter originally as an employee in his office, and

the former as associate counsel after the suit was filed. The arrangement with Hastings, and the nature of their joint venture, called for an equal division of fees. Except for petitioner having brought him into the case Hastings would never have heard of it so far as the record in this case discloses. The relations between petitioner and Hastings and O'Donnell were not changed by the discharge of petitioner by Guiterman, Perrine's representative, and Perrine; *the legal relations between petitioner, Hastings and O'Donnell were not changed unless they themselves changed them, which they did not do.*

In the same manner that petitioner hired and retained O'Donnell and Hastings, and made a definite contract with each for compensation, which contracts never were rescinded or modified, O'Donnell and Hastings could hire all the clerical and legal assistance they might desire, but only in furtherance of the joint venture and with due regard to their contracts with petitioner, i.e., to pay for such assistance, used practically exclusively in the fruitless Philadelphia cases, out of *their share* of the compensation to be received.

To hold, therefore, that such assistance hired by O'Donnell and Hastings, without the approval or even the knowledge of petitioner, should receive compensation out of by far the greater portion of petitioner's share of the fees, constitutes a denial of petitioner's property rights without due process of law in violation of the Fourteenth Amendment to the Constitution.

Hastings did nothing, however much labor he expended, which did not enure to the benefit of petitioner unless otherwise agreed, which was not done; and petitioner did no less than the arrangements between them required.

It is impossible nicely to measure the value of their respective services. Nothing requires this to be done. It could be said, on the one hand, that except for petitioner's

services in the Perrine litigation nothing whatever would have borne fruit; and, on the other hand, that the work done by Hastings and others, even though in cases which were lost in Court, materially contributed to the ultimate outcome. The nature of their relations and the agreement between them precluded the necessity for such balancing of values. There was to be an equal division of fees without a detailed and impossible itemization of the amount and value of particular activities.

In *Robertson* v. *Gordon*, 226 U. S. 311, involving a controversy between attorneys upon facts quite similar to those in this case, the Court, speaking through Mr. Justice Holmes, said,—

> "The controversy wholly is between Robertson and Gordon, and it is unnecessary to refer to the other parties or other aspects of the case." (p. 313).
>
> "We are of opinion that the decree must be reversed and that the plaintiff (appellant) is entitled to prevail. He starts with a contract of definite meaning." (p. 314)
>
> "Again, there is no doubt that Robertson did some work, whether more or less does not matter, so that there was no failure of consideration, according to the common rather inaccurate phrase." (p. 315.)

Under the above circumstances, the disregard by the Supreme Court of the State of Delaware of the fiduciary and contractual relations between counsel has wrought a deprivation of petitioner's property in a manner so inconsistent with and violative of the principles of fundamental fairness, and so lacking in legal or evidentiary basis, as to constitute a denial of due process of law under the Fourteenth Amendment.

The Federal due process issue was seasonably raised (R. 418) and argued to the State Supreme Court. It is no longer open to question that judicial decrees or judgments in suits between private parties may be held to impair rights protected by the Fourteenth Amendment. *American*

Federation of Labor v. *Swing*, 312 U. S. 321, 61 Sup. Ct. 568. The decision of the State Court, ignores entirely the fiduciary relations which permeated the contractual relations between petitioner and Hastings and as well between petitioner and O'Donnell. The Court finds that a contract existed (Opinion of Court) but bases its decision to disregard it upon an alleged failure of consideration, in that petitioner did not perform what in fact was no part of the contract, namely, an equal or agreed amount of work. Even this latter factual conclusion is not supported by the evidence. Indeed, the Court seeks to support its theory of failure of consideration and consequent decision to disregard the contract, on the baseless assumption that petitioner took no part in the litigation after the discharge incident; and even uses against him petitioner's willingness, expressed to Hastings and O'Donnell, that they should continue in the case. This attitude of fairness on the part of petitioner to his co-counsel surely did not relieve them of their obligations to him. It should have bound them more closely to him.

The decision below and the basis upon which it expressly rests, it is submitted, constitute not mere error of a State Court which it would not be the concern of this Court to correct, but a departure from settled principles governing contractual-fiduciary relations between counsel, leading to unconscionable results in disregard not only of important property rights of petitioner but of the principles governing fiduciary obligations which lie at the foundation of so much of human activity.[6] For the State Court merely to say there was a "failure of consideration" does not furnish a State ground of decision independent of the Federal question. It is to decide the Federal question of due process which was raised as a barrier to a ground of decision which would ignore the fiduciary-contractual relationship and which would treat petitioner's property rights

[6] It is to be noted that petitioner's ex-employe, O'Donnell, is awarded $521,550.00 as compared with the $300,000.00 awarded petitioner.

as only a right to *quantum meruit* notwithstanding the merged interests of co-counsel in the whole, growing out of the relationship between them.

For the Court to ignore, though pressed upon it, the existence of the contractual-fiduciary relations, here the relations between counsel under contract and engaged in a joint venture, is a denial of due process of law; and the factual aspect of the decision of the Court is so devoid of evidentiary support, and contrary thereto, as to be arbitrary, and thus a denial of due process of law. *United States* v. *B. & O. R. R.*, 293 U. S. 454; *Florida East Coast Line* v. *United States*, 234 U. S. 167 at 185; *Interstate Commerce Commission* v. *L. & N. RR.*, 227 U. S. 88 at 91.

In *Malinsky et al* v. *New York*, 324 U. S. 401, this Court said

> "The guaranty of the Fourteenth Amendment inescapably imposes upon this Court an exercise of judgment upon the whole course of the proceedings in order to ascertain whether they offend those canons of decency and fairness which express the notions of justice of English-speaking peoples"—even toward those charged with the most heinous offenses.
>
> These standards of justice are not authoritatively formulated anywhere as though they were prescriptions in a pharmacopoeia."

The principles referred to, the canons of decency and fairness, would seem *a fortiori* to call for adherence here.

Notions of justice, equity and fairness have in few areas of the law been developed with such strength as in the area of fiduciary relations.

> "Joint adventurers, like copartners, owe to one another, while the enterprise continues, the duty of the finest loyalty. Many forms of conduct permissible in a workaday world for those acting at arm's length are forbidden to those bound by fiduciary ties. A trustee is held to something stricter than the morals of the market place. Not honesty alone, but the punctilio of an honor the most sensitive, is then the standard of behavior. As to this there has developed a tradition

> that is unbending and inveterate. Uncompromising rigidity has been the attitude of courts of equity when petitioned to undermine the rule of undivided loyalty by the 'disintegrating erosion' of particular exceptions. *Wendt* v. *Fisher,* 243 N. Y. 439, 444, 154 N. E. 303. Only thus has the level of conduct for fiduciaries been kept at a level higher than that trodden by the crowd. It will not consciously be lowered by any judgment of this court." *Meinhard v. Salmon et al,* 239 N. Y. 458, 164 N. E. 545, Cardozo, J.

Cases almost without number could be cited of similar tenor, resting upon the old English equitable principles never departed from.

The question posed by this petition is whether full consideration by this Court should be drawn to a final decision of the highest Court of a State which has deprived petitioner of rights inherent in the principles governing fiduciary relations, and has done this in a manner which, with the attendant circumstances, which include the arbitration by a federal judge of fees in a State case, has brought about a denial to petitioner of his property rights in the fruits of his labors and learning with respect to which he entered into a joint venture with co-counsel.

It is submitted that the course of judicial process which brought about the result below cannot be reconciled with due process of law, which encompasses the necessity for maintaining in the conduct of litigation the integrity and fair dealing which lies at the root of the canons of decency which over the centuries have developed in the area of fiduciary relations.

That petitioner and Hastings were joint venturers cannot be seriously in doubt. *Berke* v. *Murphy,* 280 Mich. 633, 274 N. W. 356; *Langdon* v. *Kennedy, etc.,* 118 Neb. 290, 224 N. W. 292; *Gugle* v. *Loeser,* 143 Ohio St. 362, 55 N. E. 2d. 580; *Hereford* v. *Meserve,* 272 Fed. 353, 355. They were also co-counsel. By reason of the former relation, as well as by reason of the latter, they were on an equal footing

in this case. What one did both did in legal contemplation.

The facts recited hereinabove preclude the possibility of "failure of consideration" *Robertson* v. *Gordon*, supra. The nature of their joint and fiduciary relations called for no equal division of work or accounting of contribution. *Consaul et al* v. *Cummings, Adm.*, 222 U. S. 262 and cases last cited above.

The judgment below excludes petitioner from the status to which he was and is of right entitled, with consequent deprivation of important property rights in a manner inconsistent with the regard of the law for the integrity, character and legal consequences of fiduciary relations.

This it is submitted raises an issue with respect to due process which is worthy of the consideration of this Court. This is especially so in view of the particular manner by which the result was brought about, sanctioned by the court below in rendering the decision it did.

The inescapable effect of the decision of the Supreme Court of Delaware in this case is that a trustee can absolve himself of that capacity merely by imagining himself relieved. It is counter to the rule of law on the subject as announced by this Court and by the high court of every state which has dealt with the subject matter. Nevertheless, it will set a rule of substantive law that will be controlling on the point on the Federal Court for the District of Delaware. Uncorrected, it will be provocative of much mischief.

The man whose efforts lay at the basis of the full recovery is rewarded little better than intervenors who arrived late and did little if anything more than stand by in order to profit by the outcome; and those whom petitioner brought into the case arrange in Philadelphia for the fixing of their fees independently of him and independently of the Court where the only case the Pennsylvania

Railroad Company would settle was pending—the case brought by petitioner.

Petitioner is entitled, as he properly sought in the Court which controlled the funds, to one-half of the fees of counsel for the complainants. He is entitled by reason of the due process clause of the Fourteenth Amendment to a decision of the State Court based upon recognition by that Court of the fiduciary relations between counsel and the joint venture character of their undertaking.

Respectfully submitted,

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February, 1948

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1947

No. 616

FRANK M. SWACKER,

Petitioner,

vs.

THE PENNROAD CORPORATION AND DANIEL O. HASTINGS

ON PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF DELAWARE

BRIEF FOR RESPONDENT DANIEL O. HASTINGS IN OPPOSITION

Opinions Below

The opinion of the Court of Chancery of the State of Delaware, in and for New Castle County (R. 394-412) is reported in 51 A. 2d 327, 336-343. The opinion of the Supreme Court of the State of Delaware (R. 990) is reported in 57 A. 2d 63.

Jurisdiction

The judgment of the court below sought to be reviewed was entered on December 19, 1947 (R. 1002). Petition for a writ of certiorari was filed February 21, 1948. The jurisdiction of this Court is invoked under Section 237(b) of the Judicial Code as amended by the Act of February 13, 1925.

Question Presented

Whether alleged errors of law by the Supreme Court of Delaware, in holding an alleged fee agreement of petitioner with respondent to have terminated for failure of consideration and in affirming the order of the Court of Chancery for allowance of fees to petitioner only on a *quantum meruit* basis, constitute a deprivation of petitioner's property without due process of law in violation of the Fourteenth Amendment.

The alleged errors are:

1. Refusal of the court to recognize that "there is inherent in a joint venture by attorneys a fiduciary relation that precludes one of them from dealing for his own account to exclusion of his associate with the subject matter of the joint venture."

2. Finding by the court, allegedly without any evidence to support it, that one of the conditions of the agreement for equal division of fees was the practically equal division of work.

3. Finding by the court, allegedly contrary to the undisputed evidence, that petitioner failed to perform the work required of him under the contract.

Statute Involved

There is involved no statute or other legislative action of the state or any subdivision thereof.

Statement

This is a proceeding by petitioner to obtain allowance of fees for his services in a stockholders' derivative action on behalf of The Pennroad Corporation which finally terminated in the payment of $15,000,000 to that corporation by the Pennsylvania Railroad (R. 1). Petitioner in his petition in the Court of Chancery, filed March 19, 1945, asserted a half interest in such fees as might be allowed to respondent Daniel O. Hastings by virtue of an oral agreement entered into by the parties in January, 1937; and at the hearing he also relied on a *quantum meruit* theory in the alternative.[1] Respondent Hastings answered alleging the contract had long been terminated by reason of petitioner's discharge by his clients in 1938 but suggested that Swacker be paid the value of his services on the *quantum meruit* (R. 7, 11).

The trial court, after hearing and on February 17, 1947, filed its opinion (R. 394; 51 A. 2d 327) holding that an essential term of the oral agreement was that each party would render substantial and continuous contributions to the prosecution of the case covered by it (R. 405). It further found that as a result of petitioner's discharge from the case by his clients there was a failure of consideration because full performance was a condition precedent (R. 410, 417). It concluded that the petitioner was entitled to a fee of $300,000 representing the fair value of his services (R. 411-412). Accordingly it entered its decree: (1) denying the prayer for joint allowance of fee to petitioner and respondent and denying the prayer for award of one-half thereof to petitioner, and (2) authorizing payment to petitioner of a free of $300,000 (R. 413, 414).

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[1] Contrary to petitioner's assertion (Pet. 3), the petition in the Court of Chancery makes no slightest mention of a Federal right nor does it otherwise raise a Federal question.

On appeal, the Supreme Court of Delaware, after argument, filed its opinion incorporating substantially the same conclusions (R. 996, 999) and entered its judgment of affirmance (R. 1002).

So far as appears necessary for the purposes of this petition, the pertinent facts may be briefly stated as follows:

The evidence showed that petitioner, an attorney, was retained in 1930 on a contingent fee basis by one Guiterman, a stockholder in The Pennroad Corporation, a Delaware corporation, to bring a stockholders' derivative suit on behalf of that corporation and in the name of stockholder relatives of Guiterman (the Perrines) against the Pennsylvania Railroad (R. 58-59, 868, 869, 929). On October 18, 1932 in the Court of Chancery of the State of Delaware with Richards, Layton & Finger of Wilmington as co-counsel (R. 65, 81) he filed a suit entitled *Perrine et al.* v. *The Pennroad Corporation, etc. et al.* (R. 80-81, 397). In June, 1936, Richards, Layton & Finger, withdrew due to conflict of interest (R. 96, 398).

After this withdrawal, petitioner engaged the respondent Hastings who initially agreed merely to be local counsel of record with a one-third participation in the fee (R. 97, 398). This agreement, however, was supplanted in January, 1937 by a new oral agreement for equal participation in the fee by Swacker and respondent Hastings in consideration of the latters' taking an "active part" in the litigation (R. 884).

In a conference in January, 1937, Swacker and Hastings orally agreed that the fees contingent upon success in the pending litigation should be divided equally between them after payment of five to ten per cent to the estate of J. Markham Marshall, a participating lawyer who had died in 1936 (R. 399; Pet. 8). As to division of work, Hastings testified that it was generally understood among them "that we would divide the work practically equally" (R. 289).

Swacker admitted on cross-examination that "it was an implied condition," of the agreement that he should participate as trial counsel and in the briefs and argument on appeal if there should be trial and appeal in the *Perrine* case (R. 231-232).

Swacker was discharged by his clients on March 18, 1938 (R. 904-907). Swacker gave his consent that both Hastings and O'Donnell [2] go ahead with the litigation without him (R. 228, 294, 299, 360) saying that he would recover from Guiterman (R. 294).[3] Swacker admitted that he surely expected to do "his share of the work" and that after his discharge he did not do that and therefore thought the contract should be modified in Hastings' favor (R. 236, 249, 250). Elsewhere in the testimony Swacker agreed that he should have less compensation because of his inactivity after he was discharged as counsel (R. 165, 166, 369, 370, 928, 933). Swacker testified that he attempted to negotiate a contract with Hastings whereby he would get less than under the fifty-fifty agreement which he now claims continued in effect (R. 237, 238). The record indicates that Swacker realized that his fifty-fifty contract had terminated also because in 1941 he insisted upon having "some agreement" and "a definite agreement" with Hastings (R. 938, 946).

Guiterman indicated he wanted Hastings and O'Donnell to continue in the case (R. 112). Thereafter Guiterman also retained Robert E. Lee Marshall of Baltimore whose advice resulted in formation of a stockholders' committee (R. 307-309) and in his bringing of the *Overfield* suit in the

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[2] Hugh O'Donnell first worked on the case as an employee of Swacker (R. 69-70) but in 1935 he began practice on his own account continuing in the *Perrine* case under agreement with Swacker for contingent compensation from Swacker's share at $100 per day but not more than 10% of the whole fee allowed counsel (R. 348-9, 994).

[3] He did in fact bring suit against Guiterman for $300,000 (R. 18, 19) in the New York courts where it is still pending.

Federal District Court for the Eastern District of Pennsylvania against Pennroad *et al.* (R. 310-312).

In May of 1940, Hastings and Max Swiren of Chicago in the same Federal court brought another suit against Pennsylvania Railroad, *et al.* acting on behalf of one Weigle (R. 298).[4] After initial proceedings establishing jurisdiction, Marshall invited Hastings to participate (R. 313-314). Thereupon, the *Overfield* and *Weigle* cases were consolidated for trial and after a trial lasting more than 70 days (R. 380) with Hastings as chief counsel and so recognized by that court (R. 995) and with Swacker not participating (R. 236), judgment for $22,104,515.92 was obtained (42 F. Supp. 586; 48 F. Supp. 1008); but this was reversed by the Circuit Court of Appeals for the Third Circuit on the ground suit was barred by the statute of limitations. *Overfield* v. *Pennroad Corporation,* 146 F. 2d 889 (Biggs, J., dissenting). Within the time for filing petition for rehearing as extended by that court, and in the light of a contemplated petition for certiorari, negotiations by Hastings and Pennroad for settlement resulted in an agreement by the Pennsylvania Railroad Company for payment of $15,000,000 to The Pennroad Corporation, $3,000,000 to be set aside as the maximum amount applicable to payment of attorneys fees and expenses in the litigation. This agreement constituted settlement of all causes of action pleaded in the *Overfield, Weigle* & *Perrine* complaints. Upon the petition for approval filed by Pennroad in the *Perrine* case, it was approved by the Delaware courts. *Perrine* v. *Pennroad Corporation,* 43 A. 2d 721; 47 A. 2d 479, cert. denied 329 U. S. 808. Thereupon the three suits were dismissed.

Promptly after the filing of the Pennroad petition for approval, Swacker in that proceeding filed his petition here

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[4] At this stage O'Donnell and Hastings represented the Perrines in Delaware; O'Donnell and Marshall represented Overfield, and Hastings and Swiren represented Weigle (R. 298).

involved requesting the Chancery Court of Delaware to retain jurisdiction over the settlement fund and to make an allowance to Swacker and Hastings and an award to Swacker of one-half of the allowance to both of them (R. 1-4).

After answer by Hastings (R. 7) and hearing (R. 33) the Court of Chancery filed its opinion February 17, 1947 (R. 394-412). It held that the oral fee agreement of the parties included an understanding that each party thereto "would, throughout its existence, render substantial and continuous contributions to the prosecution of the case" (R. 405). It also found that after March, 1938, Swacker had failed to perform the services so required of him and that there was a resultant failure of consideration (R. 406-407) barring recovery under the agreement (R. 410). However, it did award him $300,000 on his alternative *quantum meruit* theory (R. 410-412).[5]

The Supreme Court of Delaware, in affirming, took substantially the same view as the trial court, holding, however, that the agreement meant that Hastings and Swacker "would divide the work practically equally" (R. 997), and that Swacker's failure to take part after his discharge resulted in termination of the contract with Hastings (R. 997).[6] Accordingly that court entered the judgment here sought to be reviewed (R. 1002).

Argument

The most cursory examination of the record in this case discloses that the federal questions here relied upon to

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[5] Thereafter, under an arbitration agreement dated March 2, 1945, between The Pennroad Corporation, and the attorneys in the *Overfield* and *Weigle* cases (R. 28), a report of the arbitrator, Judge Welch, was submitted May 5, 1947, making an award of fees to such attorneys and certain committees (R. 985).

[6] Neither State court found it necessary to pass upon the defense of abandonment which the respondent, relying on substantially the same evidence, asserted in both courts.

sustain this Court's jurisdiction under section 237(b) of the Judicial Code are so unsubstantial as to render the petition plainly frivolous. None of the authorities cited by petitioners, even remotely sustain jurisdiction.

Under "Question Presented" (Pet. 2) and the specification of errors (Pet. 4) petitioner apparently attempts to state three Federal questions:

(1) Whether refusal of the Delaware Supreme Court to follow "the rule of law applicable to", or "the fundamental doctrine as to the fiduciary relationship inherent in a joint venture" is a deprivation of property without due process of law in violation of the Fourteenth Amendment to the Constitution of the United States" (Pet. 2). The specifications of error, Nos. 1-4 (Pet. 4) apparently pertain to this point.

(2) Whether the finding—allegedly wholly without evidence—that the contract included as a condition the requirement that petitioner perform one-half of the work was so arbitrary as to violate petitioner's right to due process under the Fourteenth Amendment (Pet. 2-3, 21).

(3) Whether the finding—allegedly directly contrary to the evidence—that petitioner had failed to perform the work required of him under the agreement was so arbitrary as to deprive petitioner of property without due process of law in violation of the Fourteenth Amendment (Pet. 2-3, 21).

Specifications of error, Nos. 5 and 6 (Pet. 4) pertain to the last two questions.

On their face these contentions present no substantial Federal question nor any occasion for the exercise of the jurisdiction of this Court.

I

The State Decisional Law Governing Contracts of Joint Venture Involves No Federal Question and No Federal Question With Respect Thereto Was Properly Raised Below.

Petitioner complains first of a failure of the court below "to recognize the fundamental doctrine that there is inherent in a joint venture by attorneys a fiduciary relationship that precludes one of them from dealing for his own account to the exclusion of his associate with the subject matter of the joint venture" (Pet. 2).

(1) *The state decisional law of contracts relating to matters of joint venture involves no Federal question.*—The petitioner apparently proceeds on the theory that the due process clause of the Fourteenth Amendment imposes on the state court a duty to follow a sort of Federal common law of contracts. No authorities are cited for the proposition. The rule to the contrary, both in law and in equity, is established. *Erie R. R. Co.* v. *Tompkins,* 304 U. S. 64, 78; *Ruhlin* v. *New York Life Ins. Co.,* 304 U. S. 202, 205.

Indeed, the petitioner recognizes the rule of the *Erie* case which defeats his contention, whether this be regarded as a question of ordinary contract law or of specialized joint-venture contract law. He states that the decision below "establishes a rule of law that will be binding on the Federal court for the District of Delaware" (Pet. 4, 24). In the application of this rule no distinction is suggested as between trial and appellate Federal courts and of necessity there can be none.

(2) *Due process does not include a guarantee of freedom from error in determination of state court litigation.*—At most, petitioner's argument as to the incidents of the contract is merely a contention that the state court's decision was wrong. It is not contended that there was any lack of procedural due process. It has long been uniformly ruled

that the Fourteenth Amendment of the Constitution of the United States creates no right in litigants to, nor correlative duty on the part of the state courts to make, decisions free from error in matters involving no Federal question because purely of state cognizance. *Arrowsmith* v. *Harmoning*, 118 U. S. 194, 196; *Central Land Company* v. *Laidley*, 159 U. S. 103, 112; *New Orleans Waterworks Co.* v. *Louisiana*, 185 U. S. 336, 344, 351-352; *Tracy* v. *Ginzberg*, 205 U. S. 170, 177-178; *Bonner* v. *Gorman*, 213 U. S. 86, 91; *American Ry. Express* v. *Kentucky*, 273 U. S. 269, 273; *Worcester County Co.* v. *Riley*, 302 U. S. 292, 299; see *Brinkerhoff-Faris Co.* v. *Hill*, 281 U. S. 673, 680.

(3) *The asserted Federal question was not raised in or considered by the courts below.*—Contrary to petitioner's assertion (Pet. 3) no Federal right was asserted or even remotely suggested as being involved in his petition in the trial court (R. 1-4).

The opinion of the Supreme Court of Delaware contains not the slightest reference to any Federal question (R. 990-1001). Petitioner's assignment of errors with respect to the refusal of the trial court to apply his concept of the applicable principles of the law of fiduciaries was inadequate to raise any Federal question. The assignment upon which he relies on this point, Assignment 7 (Pet. 3; R. 418) merely urges that the result of the trial court's decision was "a denial of due process." Under the rules of this Court, this is deemed a reference solely to the due process provision of the State Constitution (Art. I, sec. 7; *Ajax Distributors* v. *Springer*, 22 A. 2d 838, 841 (Del. Ch.)) to which petitioner specifically refers in his assignment of error No. 6 (R. 418) and affords no basis for invoking jurisdiction of this Court. *Bowe* v. *Scott*, 233 U. S. 658, 665; *Dobry* v. *Iowa*, 293 U. S. 519; see *Gibbs* v. *Zimmerman*, 290 U. S. 326, 328. Errors not set out in the assignment of errors will not be considered by the Supreme Court of Delaware

(Rules 9, 10) or by this Court. *Hiawassee Power Co.* v. *Carolina-Tenn. Co.*, 252 U. S. 341, 343-344; *Chandler* v. *Manifold*, 290 U. S. 665-666; *Dorrance* v. *Pennsylvania*, 287 U. S. 660-661.

It is plain, therefore, that this alleged Federal question was neither raised in, nor considered by the Supreme Court of Delaware. The asserted right under the Federal Constitution was plainly not "specially set up or claimed" so as to vest this Court with jurisdiction within the meaning of Section 237 (b) of the Judicial Code.

II

The Findings of the Court as to the Terms of the Contract and the Fact of Non-Performance by Petitioner Are Amply Supported by Evidence and Involve No Obligation of the Due Process Clause

The contention of petitioner based on the lack of evidence to support the findings as to (1) the terms of the contract and (2) the lack of performance by petitioner may be considered together. Petitioner has cited no case holding that the making of findings without evidence or contrary to the undisputed evidence constitutes a judicial denial of due process. However, even if it be assumed, *arguendo*, that decision based upon findings so made would be so arbitrary as to infringe a party's rights under the Fourteenth Amendment, it is manifest that there was no such infringement here.

(1) *The finding that the contract included the requirement of performance of one-half the work by each party was amply supported by evidence.*—As to division of work under the agreement, Hastings testified that it was generally understood among them "that we would divide the work practically equally" (R. 289). Swacker denied this and asserted that the agreement was that each should "do what might most naturally fall to us to do" (R. 231).

He admitted on cross-examination, however, that it was an implicit condition of the agreement that he should participate as trial counsel and in the briefs and argument on appeal if there should be trial and appeal (R. 231-232).

The trial court found the activities of the parties between January, 1937 and March, 1938, before any disagreement arose, indicative of the meaning of the agreement (R. 403, 404). During this period Swacker was doing and causing O'Donnell to do substantial work and Hastings, while doing substantial legal research and pursuing evidence, also relied heavily on Swacker (R. 404). Swacker admitted that he surely expected to do "his share of the work" and that he did not do that and therefore after his discharge thought the contract should be modified in Hastings' favor (R. 249, 250). Elsewhere in the testimony Swacker agreed that he should have less compensation because of his inactivity after he was discharged as counsel (R. 165, 166, 369, 370, 928, 933). After Swacker was discharged and O'Donnell told him of a contemplated agreement between participating counsel reserving a maximum of 18% for Swacker, he said he would not accept that, but did not assert a continuing right to 50% (R. 363). Swacker testified that he attempted to negotiate a contract with Hastings whereby he would get less than the 50% which he now claims (R. 237, 238).

The record indicates that Swacker realized that the original contract required substantially equal work and that he had not so performed, and, indeed, indicates abandonment thereof. For in 1941 he insisted upon having "some agreement" and "a definite agreement" with Hastings (R. 937, 938, 946).

It was upon consideration of all this evidence that the trial court reached its finding that the oral agreement contained as one of its essential terms the requirement that each party should "throughout its existence render substantial and continuous contributions to the prosecution of

the case" (R. 404-405). And on the same evidence the Supreme Court of Delaware concluded that the agreement "meant that they would divide the work equally" (R. 997).

Plainly the record does not support petitioner's contention that there was no evidence to support the finding of the courts below as to his duty under the agreement.

(2) *The finding that petitioner failed to perform the work required of him under the agreement is based on ample evidence.*—Petitioner also asserts the finding of non-performance by Swacker (R. 406, 995, 996) upon which the courts below concluded that there was a failure of consideration (R. 406, 998) was contrary to the undisputed evidence (Pet. 4-5, 21).

Contrary to petitioner's premise, the evidence amply supports this finding in which the two State courts concurred:

Swacker himself testified that he didn't do his share of the work under the fifty-fifty agreement (R. 249, 236) and that that was why he and Hastings should have a readjustment (R. 249). His only visit to Philadelphia during the trial was to seek a new fee contract with Hastings (R. 237) by which he would get less (R. 238). Immediately after his discharge, according to his own memorandum sent to Hastings (R. 928-929), he explained to O'Donnell that he had withdrawn from active participation (R. 933) and was willing to make some arrangement with Hastings on division to take cognizance of his lesser activity (R. 238-239, 933). He asked O'Donnell to get a definite new arrangement with Hastings, suggesting either 23½% or 33½% (R. 369, 370). He testified that he considered that "the situation called for a more equitable division and was ready and willing to make one" (R. 237). His work was of very slight help (R. 302, 383, 384).

Manifestly, the finding of non-performance in which both

of the courts below concurred was amply sustained by evidence and involved merely the simple determination of credibility and weight of the evidence.

Petitioner's contention is based on the premise that there was no evidence to support the findings in which the two lower courts concurred. Since the record clearly shows that there was substantial evidence in support of these findings, there is no basis for his contention.

In any event where, after appropriate hearings a State court determines that there is evidence to support a finding, its misconception or wrong interpretation of the evidence as to matters involving no Federal question because purely of State cognizance is mere error of law, uncontrolled by the due process clause of the Fourteenth Amendment and presents no substantial Federal question. *McDonald* v. *Oregon Navigation Co.*, 233 U. S. 665, 669-670; *Bell Tel. Co.* v. *Utilities Comm.* 309 U. S. 30, 32.

Conclusion

No substantial Federal question is indicated in the pleadings, the record, the errors argued, the briefs of counsel, the opinions of the trial court or the opinions of the Supreme Court of Delaware. No substantial Federal question was presented to either the lower court or the Supreme Court of Delaware and no Federal question was decided by the trial court or the Supreme Court of Delaware or was necessary to a decision of the cause. The petition presents no substantial Federal question for review and should be denied.

Respectfully submitted,

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